(4)

No. 98-1828

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,

Petitioner,

- against -

UNITED STATES OF AMERICA *EX REL.* JONATHAN STEVENS,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF AMICI CURIAE THE CITY OF NEW YORK, THE CITY OF LOS ANGELES, THE CITY AND COUNTY OF SAN FRANCISCO, AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The City of New York, the City of Los Angeles, the City and County of San Francisco, and the National League of Cities (collectively referred to as "amici") respectfully submit this brief as amici curiae supporting the petition for certiorari of the State of Vermont. Amici urge this Court to grant Vermont's petition because the Second Circuit's decision in this case, which conflicts with other circuits in allowing states to be sued under the federal False Claims Act ("FCA"), involves a critically important issue both for

states and local governments. Allowing this decision to stand without review will subject states and local government to the FCA's crushing remedies of treble damages plus penalties and will undermine the system of cooperative federalism upon which this nation was founded.

The City of New York is a municipality that annually receives in excess of $3 billion in federal funds either directly from the United States or through the State of New York for numerous essential municipal services and programs. Generally, the City of New York is responsible for providing these essential services to its citizens and for implementing these programs, while the federal government and State of New York disburse the funds and monitor their expenditure.

The City of Los Angeles is a municipality that annually receives several hundred million dollars in federal funds either directly from the United States or through the State of California for numerous essential municipal services and programs. Generally, the City of Los Angeles is responsible for providing these essential services to its citizens and for implementing these programs, while the federal government and the State of California disburse the funds and monitor their expenditure.

The City and County of San Francisco is a municipal corporation that annually receives in excess of $400 million in federal funds either directly from the United States or through the State of California, for numerous essential municipal services and programs. Generally, the City and County of San Francisco is responsible for providing these essential services to its citizens and for implementing these

programs, while the federal government and the State of California disburse the funds and monitor their expenditure.

The mission of the National League of Cities ("NLC") is to strengthen and promote cities as centers of opportunity, leadership and governance. NLC was established in 1924 by and for reform-minded state municipal leagues. NLC is comprised of 49 state municipal leagues, more than 1,500 member cities and 135,000 elected officials. Through the membership of the state municipal leagues, NLC represents more than 18,000 cities and towns of all sizes in total.

The False Claims Act was enacted in 1863 at the height of the Civil War primarily to "combat rampant fraud in Civil War defense contracts." S. Rep. No. 99-345, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5273. The chief purpose of the Act when enacted was to address fraud perpetrated by large private contractors. *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Over the years, Congress amended the FCA many times, making the most significant amendments in 1986 by, *inter alia*, increasing the statute's mandatory civil remedies from double to treble damages and from a $2,000 penalty to a $5,000-$10,000 penalty for each violation. 31 U.S.C. § 3729(a). *See* S. Rep. No. 99-345, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. Under the statute, as amended in 1986, a whistleblower, known as the "relator," is generally entitled to receive between 15 and 30 percent of the total recovery. 31 U.S.C. §§ 3730 (d)(1); (d)(2).

Prior to the 1986 amendments, it appears that, with one exception, the statute was not invoked against states or

localities. *See United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (court vacated district court decision that states were not "persons," holding instead that the district court had lacked subject matter jurisdiction over the case). Subsequent to 1986, however, there have been an increasing number of cases brought against governmental entities, thereby subjecting states and localities to the statute's severe remedial structure and allowing private individuals to collect a bounty at state and local taxpayers' expense.

The Second Circuit's holding that states are "persons" under the FCA has profound implications for the issue of local government liability. For local governments, the critical question for determining if they are "persons" under the statute is whether the statute is punitive; if so, liability may be imposed on them only if there is unequivocal congressional intent to do so. The rationale for this common law immunity is that punitive sanctions punish innocent taxpayers, not actual wrongdoers, and subject those governments to undue fiscal constraints. In the FCA context, states have also argued that punitive remedies should not be imposed against them, and, therefore, several circuits have examined the issue of whether the statute's remedial scheme was punitive. In this case, the Second Circuit held that the remedies in the FCA were not punitive, while the D.C. Circuit suggested otherwise.

As a result of the Second Circuit's holding, funding for local government services may decrease significantly. Both state and local government liability under the FCA will adversely affect localities' ability to serve their residents. Since localities receive state funding for services they provide, to the extent FCA liability depletes state

funds, state aid to those localities is likely to decrease concomitantly. Local governments and states are interdependent entities, with states providing funding and expecting local governments to provide direct services. It is local governments that actually administer many federal programs, providing services such as education, health, child welfare, and environmental protection, and it is the localities' ability to provide these critical services that is jeopardized by the treble damages and $10,000 per claim penalty imposed by the FCA against both states and localities.

Amici therefore are vitally interested in the outcome of this suit. They submit that, in seeking to combat private military profiteering during the Civil War by enacting the FCA, and in subsequently amending the statute to augment punitive remedies, Congress never intended to disrupt the administration of federal programs at the state and local level. But that is exactly the result of permitting FCA liability, since it allows recoveries of treble damages, penalties, and a windfall to an individual whistleblower, all at the expense of state and local taxpayers. Amici urge the Court to grant Vermont's petition and reverse the Second Circuit's determination that states are "persons" under the FCA.[1]

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[1] Amici do not address the issue of whether the Eleventh Amendment bars suits by relators against states when the United States does not intervene in a suit. However, since state funding for programs administered on the ground level by municipalities or other local governmental entities is threatened by the Second Circuit's holding that the Eleventh Amendment is inapplicable, amici join in Vermont's discussion of the Eleventh Amendment.

REASONS FOR GRANTING THE PETITION

I

RESOLUTION OF THE CIRCUITS' CONFLICT OVER WHETHER THE FCA IMPOSES PUNITIVE REMEDIES IS CRITICAL TO ASSESSING LOCAL GOVERNMENT LIABILITY

A. Generally, Because Punitive Remedies Penalize Innocent Taxpayers and Threaten Disruption of Government Services, Local Governments Are Immune From Them

In determining whether states are liable "persons" under the FCA, the Second Circuit, as well as the other circuits that examined the issue, focused on the issue of congressional intent. *See United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 203-08 (2d Cir. 1998); *United States ex rel. Long v. SCS Business and Technical Institute, Inc.*, __ F.3d __, 1999 U.S. App. LEXIS 5950 at *10-30 (D.C. Cir. 1999); *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 874-75 (8th Cir. 1998). Congressional intent is also central to an analysis of the FCA's applicability to local governments: if the FCA is considered punitive in nature, local governments are immune from liability unless Congress clearly intends to abrogate that immunity. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (under § 1983 of the Civil Rights Act of 1851, no punitive damages may be awarded against municipalities because Congress did not intend to subject municipalities to punitive damages).

The reason for this common law immunity from punitive damages is simple: punishment should be imposed only against actual wrongdoers. *Id.* at 261. To the extent a punitive award is allowed against a local government, however, it punishes the general public, not the individual wrongdoer. *Genty v. Resolution Trust Corporation*, 937 F.2d 899 (3rd Cir. 1991). Moreover, the goal of deterrence is not served by imposing punitive sanctions against a locality, because such sanctions are not likely to restrain future violations by individual actors; the award would not come from their pockets. *Id.* at 910. Punitive remedies imposed on a locality are in effect a "windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *City of Newport*, 453 U.S. at 261.

While traditionally local government immunity from remedies that punish has arisen in the context of punitive damages, this Court has applied the same principles to other civil remedies that may be viewed as punishment, including treble damages. As this Court commented in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981), a case brought under the Clayton Act, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . . "[2] In *City of*

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[2] This Court also considers civil penalties to be punitive under common law principles. *See United States Department of Energy v. Ohio*, 503 U.S. 607 (1992) (civil penalties under the Clean Water Act and the Resource Conservation and Recovery Act of 1976 intended as punishment); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) ("the remedy of civil penalties is similar to the remedy of punitive damages").

Newport, this Court relied on *Hunt v. City of Boonville*, 65 Mo. 620 (1877), a case exempting municipalities from treble damages under a state trespass statute, because such damages would penalize innocent taxpayers. 453 U.S. at 261. *See also Genty*, 937 F.2d 899 (municipalities not liable under RICO because of treble damages remedy); *Barnier v. Szentmiklosi*, 810 F.2d 594 (6th Cir. 1987) (treble damages not allowed against a municipality under Michigan false arrest statute).

Thus, on its face, the FCA's remedies of treble damages and a $5000 to $10,000 penalty for each false claim appear punitive. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1860 (June 1992) (in 1986, by increasing the FCA's double damages to treble damages and raising the penalties, Congress was instituting "new punitive sanctions").

B. The Circuits Are in Direct Conflict Over Whether The FCA Imposes Punitive Remedies

In arguing that a state is not a "person" under the FCA, the state defendants asserted that Congress did not clearly express its intention to subject states to liability, and that this congressional intent must be crystal clear because in common usage, the term "person" does not include states. *Stevens*, 162 F.3d at 203; *Long*, 1999 U.S. App. LEXIS 5950 at *7-10; *Zissler*, 154 F.3d at 11. As a corollary, the states argued that courts have not ordinarily imposed punitive remedies against states, so the fact that the FCA's remedies are punitive provides further evidence that Congress did not intend states to be defendants under that statute. *Stevens*, 162 F.3d at 207; *Long*, 1999 U.S. App.

LEXIS 5950 at *19-20; *Zissler*, 154 F.3d at 873. In the context of determining whether states are "persons" under the FCA, therefore, the circuits discussed whether the statute is punitive, parting ways completely on this issue.

The D.C. Circuit in *Long* addressed the issue of the punitive nature of the statute, because the state had argued that the statute's remedies "created a form of punitive damages that would be palpably inconsistent with state liability." *Long*, 1999 U.S. App. LEXIS 5950 at *19. Looking back to the intent of Congress when it enacted the statute in 1863, the D.C. Circuit commented: "The 1863 Congress . . . made clear as day that it intended criminal, and a fortiori punitive, sanctions . . . . Those provisions are surely inconsistent with the concept of state liability." *Id.* at 20. Further, the court pointed out that the statute could be characterized as remedial only prior to the 1986 amendments, when the statute provided for double damages of which the government only received a one-half share. *Id.* at *19, citing *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 n.3 (S.D.N.Y. 1998) (district court held that states and municipalities were not persons under the FCA and that the statute was punitive).[3] By implication, the court reasoned, once the statute was amended to increase the penalties to treble damages and decrease the relator's share, it was no longer merely making "the government whole." *Id.*

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[3] The D.C. Circuit in *Long* relied heavily on the district court's analysis in *Graber* in determining that Congress did not intend states to be liable under the FCA, although it noted that "[o]f course, *Stevens*, not *Graber*, is Second Circuit law." *Long*, 1999 U.S. App. LEXIS 5950 at *13 n.7.

In contrast, in this case, the Second Circuit rejected the state's argument that the treble damages and penalties of the FCA are punitive and that the statute therefore did not authorize suits against states. *Stevens*, 162 F.3d at 207. In a cursory discussion, the Second Circuit explained that the double damages in the 1863 FCA were remedial, enacted in order to fully compensate the government for its losses. *Id.* However, the Second Circuit never even mentioned the issue that the D.C. Circuit found critical -- whether the change to treble damages and escalation of penalties made the statute punitive.

Applying different reasoning, the Eighth Circuit in *Zissler* rejected the argument that the FCA's remedies "alter the usual constitutional balance of federalism because they are extracompensatory." *Zissler*, 154 F.3d at 873. Without citation, the court determined that, while private citizens may not necessarily recover more than compensatory damages from states, the federal government is not so restricted. *Id. Contra Graber*, 8 F. Supp. 2d at 350-351. The court in *Zissler* further stated that FCA's remedies were compensatory rather than punitive, citing an Eighth Circuit double jeopardy case which held that an FCA civil suit did not bar a subsequent criminal prosecution. *Id.*, citing *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997). In citing a double jeopardy case, however, the court in *Zissler* did not consider, as the court in *Graber* had, the distinction between "punitive" civil sanctions for the purpose of the Double Jeopardy Clause and punitive sanctions for the purpose of governmental immunity from suit. *See Graber*, 8 F. Supp. 2d at 350, citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943) (despite the fact that multiple civil damages provided for in the False Claims Act

are akin to punitive or exemplary damages, for purposes of the application of the Double Jeopardy Clause, they do not constitute a criminal penalty or cause the remedy to lose the quality of a civil action).

Both in approach and result, therefore, the three Circuits that considered whether the FCA's remedial structure is punitive differed completely. Since this issue is highly relevant to state liability and its resolution is critical to assessing local government liability under the FCA, this Court should resolve it by granting Vermont's petition.

II

RESOLUTION OF THE CIRCUITS' CONFLICT OVER CONGRESSIONAL INTENT IS CRITICAL TO ASSESSING LOCAL GOVERNMENT LIABILITY

Where a statute is found to be punitive, local governments are immune from liability unless Congress clearly intended to abrogate that immunity. *City of Newport*, 452 U.S. at 261. The Second Circuit in this case, the Eighth Circuit in *Zissler* and the D.C. Circuit in *Long* all analyzed congressional intent under the FCA as reflected in the statute's language and legislative history to determine whether Congress contemplated state liability. In several critical places, the FCA's language and legislative history discuss states and political subdivisions together. *See* 31 U.S.C. §§ 3732(b); 3733(a)(1); S. Rep. No. 99-345, 99th Cong., 2d Sess. 8-9, *reprinted in* 1986 U.S.C.C.A.N. 5273-74. As a result, the reasoning of all three circuits concerning congressional intent to subject states to liability is significant to local governments.

Specifically, in discussing the statutory language, the Second Circuit's conclusion that states are "persons" subject to liability was based on its determination that states are persons under other FCA provisions and that, ordinarily, the same word means the same thing throughout the statute. *Stevens*, 162 F.3d at 205. *Accord Zissler*, 154 F.3d at 875. The Second Circuit relied on the fact that first, courts have allowed states to be relators under the provision that a "person" may bring a civil action for a violation of the FCA; *Stevens*, 162 F.3d at 204-05; second, the FCA contains a provision that allows states and local governments to join state law claims with FCA claims, 31 U.S.C. § 3732(b); *Id.* at 205; and third, states are explicitly stated to be "persons" (along with their political subdivisions) subject to pre-complaint discovery under the FCA's civil investigative demand ("CID") section. 31 U.S.C. § 3733(a)(1), *Id.* at 207.

The D.C. Circuit in *Long* disagreed explicitly with the Second Circuit on each and every one of these points. First, it argued that the fact that courts have allowed states to be relators does not indicate that was Congress's intent.[4]

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[4] Amici believe that Congress's intent was to allow states and local government to be relators, and that this is not inconsistent with its intent to exclude states and local governments from liability under the FCA. The definition of "person" in § 3729 is different from the definition of "person" in § 3730. Section 3730(e) specifically defines which persons may be relators and excludes several categories of persons, but does not exclude states and local governments. It is basic statutory construction that "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 913 (E.D. Va. 1989) (continued

Second, it read § 3732(b) as permitting intervention by states for recovery of state funds, rather than allowing states to be relators. Third, it pointed out that the listing of "states" as "persons" subject to civil investigative demands includes the caveat "for purposes of this section," so it cannot be construed to subject states to liability as "persons" in a different section of the Act. Moreover, the D.C. Circuit found that distinction quite logical: "It seem rather obvious, however, that states could provide useful evidence to establish that private contractors, for example, made false claims." *Long*, 1999 U.S. App. LEXIS 5950 at *4-*6.

The three circuits' views of the FCA's legislative history also evidence profound disagreement. Both the Second and Eighth Circuits claimed legislative history support for their conclusion that Congress intended state liability under the Act. According to the Second Circuit, the 1863 Congress was concerned about all kinds of fraud perpetrated on the federal government, including fraud by state officials. This conclusion was based on the publication of a House Report in 1862 which specifically had noted the problem of state officials' participation in fraudulent activities. *Stevens*, 162 F.3d at 206. The Eighth Circuit emphasized the 1986 amendments' purpose to make the statute a more useful tool to combat fraud, so that it should be construed to reach states as potential defendants, since states receive a significant amount of federal funding. *Zissler*, 154 F.3d at 874.

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[4] (...continued)
(citations omitted). In contrast, no specific exclusions are contained in § 3729, the liability provision of the FCA.

Countering these arguments, the D.C. Circuit first explained that the fraud of state officials referred to in the 1862 House Report was not committed against the United States government, and that, in any event, this piece of legislative history was not linked to the passage of the FCA. *Long*, 1999 U.S. App. LEXIS 5950 at *14. Second, it argued, the broad purpose of the FCA to counter fraud cannot be sufficient to answer the question of whether states were made potential defendants under the FCA, particularly since Congress's primary concern in 1863 was to address frauds perpetrated by private military contractors. *Id.* at *11-12. Third, it considered the *Zissler* court's point that an effective anti-fraud statute would subject states to liability simply because they receive a substantial amount of money from the federal government "similarly unpersuasive," *id.* at *12. It reasoned that a court's role in examining congressional intent is "not to 'engraft on a statute additions which [the court] thinks the legislature logically might or should have made.' " *Id.*, quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

Finally, both the Second and Eighth Circuits relied on a section in the Senate report accompanying the 1986 amendment to the FCA, which, in describing the "history of the FCA," states that "the False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations and corporations . . . . as well as States and political subdivisions thereof." *Stevens*, 162 F.3d at 207, quoting S. Rep. No. 99-345, 99th Cong., 2d Sess. 8-9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273-74. *See also Zissler*, 154 F.3d at 874-75.

The D.C. Circuit, however, pointed out that this portion of the Senate Report was utterly unconnected to any of the substantive amendments made by the 1986 Congress; it was merely a "legislative observation about what § 3729(a), enacted by an earlier Congress, means. Such post-enactment legislative history is of no import when the subsequent Congress takes on the role of a court and in a report asserts the meaning of a prior statute." *Long*, 1999 U.S. App. LEXIS 5950 at *21-22, citing *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). Moreover, the court reasoned, because the Report only was attempting to describe the way in which the Supreme Court had interpreted the Act, and it was completely wrong in its analysis, "the Report is of no legal significance," *Long*, 1999 U.S. App. LEXIS 5950 at *23. *Accord Graber*, 8 F. Supp. 2d at 353-54.

Thus, in looking at the statutory language and legislative history of the FCA, the three circuits could not have diverged more. The resolution of their debate has profound implications for local governments, since Congress consistently discussed states and their political subdivisions in the same breath. Once this Court resolves the circuits' split over whether states are "persons" under the FCA, it necessarily will settle the closely-linked question of local government liability under that statute as well.

III

ALLOWING LOCAL GOVERNMENT LIABILITY UNDER THE FCA THREATENS DISRUPTION OF GOVERNMENT SERVICES AND UNDERMINES THE COOPERATIVE RELATIONSHIP AMONG THE UNITED STATES, STATES AND LOCALITIES

Resolution of the issues presented in this case is critical to local governments. Local governments are unlike private corporations. Treating them the same under the FCA threatens disruption of government services and undermines the cooperative partnership among different levels of government. Rather than pursuing federal monies for profit, local governments apply for and utilize federal funds for the benefit of their citizens. They do so in cooperation with states and the federal government, sharing both legal and financial responsibility for implementing a wide variety of government programs. While the federal government and states monitor and fund many government programs, it is the unique role of local governments to implement those programs and provide direct services.

Because of the range of services provided by cities with federal financial support, however, all of these services are targets under the FCA. In recent years, there has been a dramatic increase in the number of FCA suits against local governments, exposing those governments and their taxpayers to litigation costs, the risk of draconian remedies and the threatened disruption of government services. Such suits, which are rarely joined by the United States, interfere with statutory procedures for administration designed to ensure both compliance with federal requirements and the

provision of government services. As it stands now, due to the conflict in the circuits, FCA suits can go forward against states and localities in parts of the country even when the United States has suffered no damages, has declined to intervene, has exercised administrative remedies to correct possible violations, and/or has concluded that there was no fraud involved.

For example, in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997), a relator alleged improper reporting to the Department of Housing and Urban Development ("HUD") by the County of Delaware concerning the transfer of a parcel of land. Apart from the FCA action, HUD investigated the land transfer and concluded that the County owed HUD approximately $2 million. Ultimately, HUD and the County settled their dispute, with the County agreeing to remit a check to HUD, and HUD in turn consenting to return the funds to the County's line-of-credit so that the monies would be available to fund eligible activities. The United States specifically declined to join the FCA suit, concluding that the matters raised in the relator's complaint did not constitute fraud. *Id.* at 739. The Third Circuit refused to dismiss the case despite HUD's settlement with the County (*id.* at 738-39), thereby throwing a wrench into the cooperative relationship between the two levels of government. As a result of the court's decision, the relator stood to recover a bounty for himself and deprive the County of three times the amount of money that the County allegedly had improperly failed to remit to HUD, notwithstanding the settlement with HUD and the United States' conclusion that no fraud had occurred.

Similarly, in *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999), a relator charged that Green Bay's federally funded school bus operations violated federal regulations related to bus maps and stopping policies. The relator first filed a formal complaint with the Federal Transit Administration ("FTA"), which cited the City for violations and threatened to discontinue federal funding. Subsequently, the FTA approved the City's annual grant application notwithstanding the fact that it had not yet achieved full regulatory compliance. In the meantime, the relator brought an FCA action in which the United States declined to intervene. Thereafter, the FTA reported that Green Bay had come into full regulatory compliance. While the court eventually granted summary judgment for Green Bay, the City was nonetheless forced to defend a lawsuit over an issue it had already resolved with the federal government, and where it had eventually come into complete compliance. As in *Dunleavy*, the FCA suit interfered with the cooperation between the federal government and the locality and threatened the operation of a vital government program.

Finally, even in a case where the United States did intervene, *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998), application of the FCA to a state and municipality threatened to undermine Congress's scheme for providing foster care services. *See* 42 U.S.C. § 671 *et seq.* *Graber* principally involved allegations that New York City and State claimed federal foster care funds even though they did not provide all of the federally required services. However, as the court noted, "no suggestion" was made in the case that "any state or local official personally profited from the alleged fraud. Rather, all the monies apparently were used for the foster

care program." *Id.* at 356. Despite this fact, the federal government sought through the FCA to recoup three times the amount of federal funds claimed and to give a substantial portion of that recovery to the relator, an individual city employee. By contrast, the remedy established by Congress mandates that, even if substantial problems in a state's foster care program are found in a compliance review, the federal agency has no discretion to withhold foster care funds upon successful completion of corrective action. 42 U.S.C. § 1320a-1a(4).

In sum, invocation of the FCA against localities undermines the cooperative mechanisms established by Congress to foster the efficacious delivery of government services, threatening the disruption of those services through the imposition of draconian remedies mandated by the statute. Ultimately, this issue of federalism goes to the core of our governmental system, and it should be resolved by this Court.

CONCLUSION

The State of Vermont's petition for a writ of certiorari should be granted.

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